No. 80-301

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WAYNE HAVEN NURSING HOME, VALLEY NURSING HOME, PINE REST NURSING HOME, DUNROVEN NURSING HOME, ALLENDALE NURSING HOME, WELLINGTON HALL NURSING HOME and WOODCLIFF LAKE MANOR NURSING HOME,

Appellants,

v.

JOANNE E. FINLEY, M.D., State Commissioner of Health, the HEALTH CARE ADMINISTRATION BOARD and PUBLIC ADVOCATE OF NEW JERSEY,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEES JOANNE E. FINLEY AND HEALTH CARE ADMINISTRATION BOARD TO DISMISS OR AFFIRM

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Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEES JOANNE E. FINLEY AND HEALTH CARE ADMINISTRATION BOARD TO DISMISS OR AFFIRM

Pursuant to Rule 16.1(b) and (d) of the Court, the Attorney General of the State of New Jersey, on behalf of appellees, Joanne E. Finley, State of New Jersey Commissioner of Health, and the Health Care Administration Board, hereby moves to dismiss this appeal or affirm the

judgment of the Supreme Court of New Jersey on the ground that the constitutional questions raised by appellants are so insubstantial as to obviate further argument.

Counterstatement of the Case

There exists currently in the State of New Jersey an acute shortage of long term care facilities which are willing to provide skilled and intermediate level nursing care to indigent persons (Aa3).* As a result many aged poor individuals are compelled to wait, often for almost a year, in their homes, general care hospitals or other institutions where they are unable to obtain the care they require (Aa4). Additionally, individuals who have utilized private resources to obtain care in long term care facilities are forced to vacate these institutions once their limited resources are depleted (*Ibid.*).

In response to this intolerable health situation, the Commissioner of the New Jersey Department of Health, who is authorized by N.J.S.A. 26:2H-12(b) to license all long term care facilities in the State, adopted with the approval of the State Health Care Administration Board regulations requiring as a condition of licensure a home's acceptance of a "reasonable" number of indigent (therein defined as Medicaid eligible) persons or alternatively, maintenance of Medicaid eligible patients no longer able to pay fully the costs of nursing care. N.J.A.C. 8:30-14.4 (Aa35). In order to assure a flexible approach to individual circumstances, no set formulas were incorporated into the regulation. Instead, the regulation provides that when determining whether to require a nursing home to pro-

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* Aa as used throughout refers to the appendix to the Jurisdictional Statement filed by appellant with this Court.

vide beds for indigent care, the Department would consider whether and where an indigent bed shortage existed, the geographic origin of indigents in need of care, the length of time preceding placement, the costs of providing indigent care borne by other providers, such as hospitals, and whether the nursing facility "would be able to make a just and reasonable rate on equity if required to accept and care for indigent persons." N.J.A.C. 8:30-14.4(b)(1)-(5) (Aa36). Furthermore, the regulations establish a three-tiered review procedure (informal administrative review of a detailed cost analysis, quasi-judicial hearing and appellate court review), see N.J.A.C. 8:30-14.4 (b)(6)(i)-(iii) (Aa37) and N.J.S.A. 26:2H-17, in which the facility can challenge a determination by the Department that it could achieve a just and reasonable rate on equity if required to accept a specified number of indigent patients.

Appellants, who are licensed as long term care facilities by the Department of Health and are thereby subject to the requirements of N.J.A.C. 8:30-14.1 *et seq.*, filed a Notice of Appeal from the promulgation of the regulation in January 1978 with the Superior Court of New Jersey, Appellate Division. In a comprehensive decision delivered by that Court on May 1, 1979, the regulations were upheld as consistent with the statutory powers delegated to the Commissioner of the Department of Health (Aa25). The Appellate Division further rejected the appellants' facial challenge to the regulations as effecting an unconstitutional taking of their property without compensation on the grounds that the homes were assured a "reasonable rate" if they participated in the Medicaid program, see N.J.A.C. 8:30-14.5(c), and were otherwise afforded the opportunity to demonstrate before the Department of Health and thereafter the courts, their inability

to earn a just and reasonable return on equity if compelled to accept indigent patients, N.J.A.C. 8:30-14.5(d)(i) (Aa30). To the extent that these regulations conceivably would not enable the homes to obtain the maximum return available in an unregulated market, the Court concluded that such a result was not confiscatory and thereby violative of constitutional protections since a significant public objective—remedying of a social problem affecting "the health and welfare of the aged and infirm poor"—was concomitantly advanced (Aa30 to Aa31).

The Supreme Court of New Jersey thereupon granted appellants' Petition for Certification to the Superior Court of New Jersey, Appellate Division. 81 N.J. 330, 407 A.2d 1204 (1979). The American Health Care Association, a non-profit association of long term care facilities, moved on June 29, 1979 to join as *amicus curiae* in the appeal to raise an issue not presented by the appellants: namely, whether N.J.A.C. 8:30-14.1 *et seq.* violated the provisions of Title XIX of the Social Security Act as amended, 42 U.S.C. §1396 *et seq.* The motion to file an *amicus curiae* brief as to this issue was granted by the Supreme Court of New Jersey on July 10, 1979.

In a decision rendered on May 28, 1980, the Supreme Court of New Jersey concluded that N.J.A.C. 8:30-14.1 *et seq.* was "directed at an acute social problem affecting the welfare of the needy, aged and infirm, [was] well within the power and authority vested in the Department by the Legislature and [did] not constitute a taking of private property without just compensation (Aa13; see also Aa8 to Aa12). As to the Supremacy Clause issue raised by the *amicus curiae,* the Court determined that the regulation did not compel nursing homes' participation in the Medicaid program (Aa17). To the extent that it strongly encouraged participation in the program how-

ever, the Court determined that such prompting would be "in furtherance of [Title XIX's] broad social objectives." (Aa17).*

On June 27, 1980, appellants filed a Notice of Appeal with the Court pursuant to 28 U.S.C. §1257(2). Appellees have filed the within motion to dismiss or alternatively, to affirm on the grounds that no substantial federal constitutional question is raised by this appeal.

ARGUMENT

This case presents no substantial constitutional questions not previously decided by this Court.

By this appeal, appellants seek, in effect, to thwart the efforts of the New Jersey Commissioner of Health to prevent nursing homes which enjoy a monopoly position with regard to available nursing care from discriminating against the aged poor in dire need of such care. In so doing they do not proffer any substantial constitutional claims. Rather, they urge in a facial challenge to the regulation a contention as to a confiscatory taking of private property without legal or factual support as well as a Supremacy Clause violation claim expressly rejected by the federal administering agency of the Medicaid program. Since the Supreme Court of New Jersey has comprehensively and properly addressed these issues and because no issues of any constitutional significance are presented herein, the appeal should be dismissed or in the alternative, the judgment below should be affirmed.

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* In support of this conclusion the Court referred to a letter from the then Department of Health, Education and Welfare Region II in which the federal Medicaid administering agency concluded that the regulation "on its face violates no provision of the [Federal] Medicaid statute. . . ." (Aa18).

A. The requirement that quasi-public facilities enjoying a monopoly position with regard to available nursing care accept where financially feasible a reasonable number of indigent patients is a proper and legitimate exercise of the State's police power and does not effect a taking of these facilities' property.

The Health Care Facilities Planning Act (N.J.S.A. 26:2H-1*et seq.*) was enacted in 1971 to ensure that "hospital and related health care services of the highest quality [and] demonstrated need [are] efficiently provided and properly utilized at a reasonable cost." N.J.S.A. 26:2H-1. Pursuant to the Act, the State Department of Health has been delegated the central, comprehensive responsibility to develop and administer the State's policy with regard to all public and private health care facilities, statutorily defined as including nursing homes, in order to promote and protect the health of *all* inhabitants of the State. N.J.S.A. 26:2H-1. As the sole agency in New Jersey for comprehensive health planning, the Department must strive in addition to achieve the objectives of the National Health Planning and Resources Development Act (42 U.S.C. §300k *et seq.*), which includes ensuring equal access of all people to quality health care services. See 42 U.S.C. §300k(a)(1).

Under these Acts nursing homes, like hospitals and other health care facilities, have been afforded a "special status." *Doe* v. *Bridgeton Hospital Ass'n Inc.*, 71 N.J. 478, 487, 366 A.2d 641, 646 (1976), *cert.* denied 433 U.S. 914 (1977). In order to avoid an unnecessary duplication of health care services, a new nursing home may not operate without first demonstrating to the Commissioner of Health through the certificate of need review process the existence of a need for additional nursing services. N.J.S.A. 26:2H-1; N.J.S.A. 26:2H-8. In essence, licensed nursing

homes enjoy a lawful monopoly over the delivery of intermediate and skilled nursing care, and it is, therefore, implicit under the Acts that such facilities must fully serve the public interest in their approved area or region. *Doe* v. *Bridgeton Hospital, supra* at 486, 366 A.2d at 645. Indeed, by promulgating the Health Care Facilities Planning Act, the Legislature has recognized that hospitals and other health care facilities, such as nursing homes, "must serve the public without discrimination. *Their boards of directors or trustees are managing quasi-public trusts and each has a fiduciary relationship with the public.*" *Id.* at 487, 366 A.2d at 647 (emphasis supplied). As such, these facilities are subject to extensive regulation by the State to ensure that adequate and proper health services are made available to the public (Aa10). In the present situation where an acute shortage of nursing home beds for indigents prevails, the Commissioner of Health, consistent with the statutory objectives of ensuring access of all persons to health services, has properly mandated that nursing homes where financially feasible accept a reasonable number of indigents.

A facility's obligation under the regulation to accept indigent patients and thereby either the Medicaid *per diem* rate or the patients' available income only arises, however, where the Department determines that a home can still achieve a just and reasonable return on its equity. N.J.A.C. 8:30-14.4(b)(5). Although it is conceivable, though certainly not demonstrated in this matter, that some facilities may thereby be unable to maintain a maximum profit level, that result clearly does not constitute, as appellants assert, a confiscatory taking of their property. As the Court has repeatedly recognized, the State may validly interpose its authority on behalf of the public in regulating the use of private property where, as here, the interests of the public require such interference and the

means utilized are reasonably necessary to accomplish that objective. *Lawson* v. *Steele,* 152 U.S. 133, 137 (1894). Under such circumstances, a property owner constitutionally may be deprived of the most profitable use of his property without fiscal consequence to the State. *Andrus* v. *Allard,* 444 U.S. 51 (1979); *Penn Central Transp. Co.* v. *City of New York,* 438 U.S. 104 (1978); *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962); *Village of Euclid, Ohio* v. *Ambler Realty Co.,* 272 U.S. 365 (1926); *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915).*

Although the Court has recognized that under special circumstances interference with a property owner's right to exclude others from his property might require governmental compensation, see *Kaiser Aetna* v. *United States,* 444 U.S. 164 (1979), but compare *Pruneyard Shopping Center* v. *Robins,* —— U.S. —— (1980), such a conclusion under the facts of this case is unwarranted. Unlike the case presented in *Kaiser,* where the government sought to effect public access to property deemed to be private under the laws of Hawaii, the instant regulation promotes the access of indigents to facilities which under State law are considered quasi-public in nature. See Aa10. As recognized in *Doe* v. *Bridgeton Hospital Assn., supra,* an essential attribute of such quasi-public institutions is the inability to discriminate and to deny necessary treatment. In clear distinction from the *Kaiser* marina owner, the appellants' rights in their property therefore do not extend to exclusion of the public. Moreover, and as in the *Pruneyard* case, the government's encouragement of public ac-

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* As the Court recently noted in *Andrus* v. *Allard, supra* at 66, because the "[p]rediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform [and] . . . because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.

cess will be of minimal, if any, financial detriment to appellants, since they are assured a fair and reasonable return on their equity in the property. Finally, since nursing homes are heavily regulated by the State through its licensure powers in assuring that proper care is provided, their profit expectations cannot be reasonably equated with that of the *Kaiser* marina operators. On balance therefore the financial burdens, if any, imposed by the regulation are properly borne, as are other licensure requirements, by the nursing home. In these circumstances a confiscatory taking of property obviously has not occurred. See *Goldblatt* v. *Town of Hempstead, supra* at 594.

B. Appellees' enforcement of N.J.A.C. 8:30-14.1 *et seq.* would not violate any provision of Title XIX of the Social Security Act.

Moreover, contrary to appellants' contentions and as the Supreme Court of New Jersey concluded (Aa17), N.J. A.C. 8:30-14.1 *et seq.* neither by its own terms nor as a practical matter compels a nursing home's participation in the State's Medicaid program. Indeed the sole connection between the challenged regulation and the Medicaid program is that the term "indigent person" used in the regulation encompasses Medicaid recipients as well as any "person who could meet the eligibility requirements for receiving nursing care under the State Medicaid Program" (Aa35). As so defined, nursing homes as a condition for renewal or issuance of an operating license could satisfy the provisions of N.J.A.C. 8:30-14.1 *et seq.* without ever becoming a Medicaid provider by accepting or retaining patients in need of nursing care who would satisfy the categorical and financial conditions of eligibility for New Jersey's Medicaid program set forth in N.J.S.A. 30:4D-3(f) and N.J.A.C. 10:94-3.9(a). Thus, a clear choice exists for

a nursing home operator who is disinclined to participate in the Medicaid program: namely, to accept as payment of the care provided a Medicaid eligible individual the sometimes significant monthly financial resources available to him. Appellants' claims therefore of compulsory participation in the Medicaid program are without basis.

However, even assuming that the operation of N.J.A.C. 8:30-14.1 *et seq.* strongly encouraged participation in the Medicaid program, this result would not be incompatible with any express provisions of Title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.*, or Congressional policies therein. Indeed, enforcement of the regulatory policy would advance several salutory provisions of the Act.

The federal Medicaid program was enacted into law on July 30, 1965, in order to assist states through the provision of substantial federal monies to provide health services to indigent individuals and families. See 42 U.S.C §1396a(a)(10). As a condition of the receipt of these federal monies participating states must agree to implement a medical assistance program in accordance with the terms set forth in 42 U.S.C. §§1396a(a)(1)-(40), including the requirement that provision be made for the "payment of part or all of the cost . . ." of skilled and intermediate care nursing services 42 U.S.C. §1396a(a)(10)(A); 42 U.S.C. §1396d(a). Notably, however, no provision of Title XIX expressly prohibits participating states from encouraging or compelling providers of such care to join its Medicaid program.

The sole provisions of the Act which do refer to the providers of such care are quite limited in scope, and contrary to appellants' contentions, are wholly unrelated to the issue *sub judice*. For example, 42 U.S.C. §1396a(a)(23), which mandates that "any individual eligible for

medical assistance . . . may obtain such assistance from any institution, agency, . . . or person, qualified to perform the service or services required . . .", is clearly designed to benefit the Medicaid recipient rather than the provider by assuring each "recipient a free choice among qualified providers of medical assistance and to guarantee that the state will not dictate to any Medicaid recipient where he or she must receive treatment." *Briarcliff Haven, Inc.* v. *Dept. of Human Resources,* 403 F.Supp. 1355, 1362 (N.D. Ga. 1975). In so doing Congress has attempted to make medical services available to the needy in the same fashion as they are available to all others. See *Rush* v. *Parham,* 440 F.Supp. 383, 389 (N.D. Ga. 1977), app. pending *sub nom. Rush* v. *Poythress,* No. 77-2743 (5th Cir.). See also S. Rep. No. 404, 84th Cong. *reprinted in* [1965] U.S. Code Cong. & Admin. News 1943, 1965. Similarly, 42 U.S.C. §1396a(a)(27)'s requirement that providers sign "agreements" *agreeing* "(A) to keep such records as are necessary fully to disclose the extent of the services" provided Medicaid recipients, and (B) to furnish the State agency with such payment information "as the State agency may from time to time request" simply addresses a Congressional concern repeated throughout the Act (see 42 U.S.C. §§1396a(a)(26), (30) and (31)) that the State have available the means to determine whether overutilization of services has occurred or improper claims for reimbursement have been submitted.

Although a few basic minimum requirements for State participation do exist, the primary thrust of the federal Medicaid legislation is to afford a participating state considerable latitude in molding a medical assistance program in accordance with reasonably perceived needs of its indigent communities and within the limitations of prevailing budgetary constraints. See *Beal* v. *Doe,* 432 U.S. 438 (1977); 42 U.S.C. §1936. See also *Quern* v. *Mandley,* 436

U.S. 725 (1978); *New York State Dept. of Social Services* v. *Dublino,* 413 U.S. 405, 413 (1973). In other federal welfare programs where such broad discretion has been afforded participating states, the Court has ruled that any intention by Congress to supercede the exercise of State power must be expressly stated. *New York State Dept. of Social Services* v. *Dublino, supra* at 413. Moreover, the "exercise of federal superiority is not lightly to be presumed." *Ibid.,* quoting *Schwartz* v. *Texas,* 344 U.S. 199, 202-203 (1952). Clearly, appellants' failure to cite any significant provisions of Title XIX or refer to any definitive section of the Title's legislative history addressing the issue of the State's authority to compel provider participation can scarcely satisfy the demanding criterion of establishing federal pre-emptive intent.

Moreover, *Dublino* requires that the construction of the statute advanced by the federal agency charged with its execution "should be followed unless there are compelling indications that it is wrong. . . ." *Id.* at 699 quoting from *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 381 (1969). See also *Quern* v. *Mandley, supra* at 738; *Beal* v. *Doe, supra* at 447; *Yoakim* v. *Miller,* 425 U.S. 231, 235-236 (1976). Significantly, the federal Department of Health and Human Services has concluded herein that the regulation challenged "violates no provision of the [federal] Medicaid statute." (Aa18). Again in the absence of any affirmative persuasive showing by appellants that this interpretation of Title XIX is plainly incorrect, substantial deference should be granted to the federal agency's opinion.*

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* Clearly, appellants' reliance on dictum in *Briarcliff Haven, Inc.* v. *Department of Human Services, supra* at 1362-1364 cannot overcome the presumptive correctness of the federal administrative

(Footnote continued on following page)

Appellees submit that by encouraging more providers to participate in the Medicaid program through the enforcement of N.J.A.C. 8:30-14.1 *et seq.* the State effectuates the primary purpose of the federal legislation in providing necessary medical care to indigent persons. Additionally, the State's actions to increase the range of providers fosters the statutory goal of insuring a wide and free choice of providers' services. See 42 U.S.C. §1396a(a)(23). To the extent that effectuation of these goals may adversely affect nursing homes' efforts to maximize their profits through exorbitant rates, that result is permissible. See *Case* v. *Weinberger,* 523 F.2d 602, 607 n. 11 (2d Cir. 1975).*

For these reasons, therefore, it is evident, as the Supreme Court of New Jersey concluded, that the regulatory requirement that nursing homes as a condition of licensure and where financially feasible accept a reasonable number of indigents does not constitute a confiscatory taking of appellants' property and is not violative of any requirement of Title XIX of the Social Security Act. Accordingly, it is evident that no substantial constitutional questions are presented and thus the appeal should be dismissed or alternatively the judgment of the Supreme Court of New Jersey should be affirmed.

(Footnote continued from preceding page)

agency's construction. That Court's cited remarks obviously reflect recognition of the fact that until promulgation of N.J.A.C. 8:30-14.1 *et seq.* states had determined individually that making provider participation voluntary would attract sufficient providers. These statements do not address, no less decide, the issue of State discretion under the federal Medicaid Act to require as a condition of licensure, that a provider serve the aged poor.

* The insubstantiality of appellants' Supremacy Clause argument is further demonstrated by the fact that appellants determined not to raise the issue in the proceedings below. The issue was only presented to the Supreme Court of New Jersey by the *amicus curiae,* American Health Care Association.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal should be dismissed for want of a substantial federal constitutional question which would require plenary consideration by this Court or alternatively the final decision of the Supreme Court of New Jersey should be affirmed.

Respectfully submitted,

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